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Mauricio Baquero-Herrera

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THE ANDEAN COMMUNITY: FINDING HER FEET WITHIN CHANGING AND CHALLENGING MULTIDIMENSIONAL CONDITIONS

*Mauricio Baquero-Herrera**

I. INTRODUCTION

THE process of integration between the countries of Bolivia, Colombia, Ecuador, Peru, and Venezuela has passed through different stages since its beginning in 1969. The Andean Pact (AP) was the first sub-regional attempt based upon now discredited inner-looking policies of import-substitution and protective Foreign Direct Investment (FDI) regulations. Although internal and external political factors played a part, implementation of the Andean Pact was primarily hindered by economic instability, and it came under deep scrutiny in 1989. During the early 1990's, a process towards the definition of a new strategic design took place. The consolidation of the Andean market as an economic area and the enhancement of the international relations of the Group within the region and with other economic blocks became the core goals of the member countries. As a result, important steps were taken to internally consolidate the Andean Integration such as the creation of the Andean Community (AC) in 1996 and the Andean President's commitment in 1999 to the goal of establishing the Andean Common Market (ACM) by 2005.

As a result of the policy of open regionalism and under the framework of the Treaty of Montevideo 1980 Latin America Integration Association (LAIA), important agreements were reached with countries in the region. In 1995, Colombia, Venezuela (the main economic partners within the AC), and Mexico formed the Group of Three (G-3) with the purpose of establishing a Free Trade Area (FTA) by mid 2004. At first individually (Bolivia and Peru), and later as a group, Andean members signed several Partial Scope Agreements (PSAs) with the Common Market of the

* The author is a Colombian lawyer specializing in Colombian Financial Law. He holds an LLM in Banking and International Financial Law (London) and is a member of the Economic Law Department of the Universidad Externado de Colombia. He is also a Research Fellow at the Centre for Commercial Law Studies (CCLS), Queen Mary, University of London and Deputy Head of the Secretariat of the London Forum for International Economic Law and Development. The author may be reached at m.h.baquero-herrera@qmul.ac.uk.

Southern Cone (MERCOSUR) geared towards the establishment of an FTA to be implemented on July 1, 2004. In addition in 1994, member countries initiated negotiations towards the establishment of the hemispheric Free Trade Area of the Americas (FTAA), which were supposed to end in 2005. Furthermore, since May 18, 2004, Ecuador, Colombia and Peru have started simultaneous negotiations with the United States geared towards setting up individual Preferential Trade Agreements (PTAs) by 2005.

Certainly, these internal changes and different external commitments being negotiated or in execution are putting pressure on the Andean Integration Process. This unprecedented environment of deeper sub-regional integration and evolving extra sub-regional negotiations is shaping the character and nature of the AC, challenging its internal cohesion and capacity to maneuver within evolving, unpredictable and demanding conditions. Whether she will become stronger, change her nature or simply disappear is something that cannot be foreseen in the near future. However, if implementation of the internal changes and the external commitments of the negotiations begin, the actual economic environment of the Andean Countries will progressively transform, and both their domestic and supranational legal frameworks will need to be adapted accordingly.

These concurrent and demanding processes impose upon the AC and the Andean Integration System (AIS) the core tasks of building the institutions required to that end and delivering the legal reforms involved in properly implementing, at all levels of their stated commitments. This is indeed a tremendous undertaking, testing the AC's internal cohesion and strength. Is the AC sufficiently prepared to take on these simultaneous challenges? This is a question whose answer relies on three main factors: 1) the political will of the Andean leaders and their capacity to lead the AIS to a successful achievement of all the considerable assignments imposed upon it; 2) the proactive participation of the interest groups in the negotiations still in place and their effective monitoring of the implementation of the complex kaleidoscope of internal and external commitments the AC is facing; and 3) the adequate understanding of the rule of law as a means of ring-fencing the AC from the political risk and providing supranational and domestic convergence between internal and external commitments.

II. THE ESTABLISHMENT OF THE ANDEAN COMMON MARKET AND THE INTERNAL CHANGES AND CHALLENGES ORIGINATED FROM ITS IMPLEMENTATION

The establishment and consequent implementation of the ACM constitute one of the most important internal challenges faced by the Andean process of sub-regional integration after the creation of the AC in 1996. It represents a further step in the evolving stages of economic sub-regional integration, following the achievement of an FTA and an imperfect

Customs Union (CU) by the Andean countries. This demanding task has been undertaken by a sub-regional scheme which has developed certain specific features during its thirty-five years of existence and is based upon now-settled internal structures and bodies. Any approach to the ACM must take these features into consideration in order to assess the feasibility of having it in place by 2005.

Since its creation as the Andean Pact in 1969, this integration effort has pursued differential treatment for its members and has been strongly influenced by the political will of the Andean Presidents. It has also developed an impressive set of institutions and has been based on certain economic policies aimed at delivering development and better standards of living for the Andean citizenry. Among these four characteristics, this section underlines the direction and impulse given by the Andean Presidents to the scheme during the last decade. It also explores the cohesion and coherency of the system of institutions and bodies which comprise the AIS in order to achieve the ACM.

A. FROM THE ANDEAN PACT (1969) TO THE ANDEAN COMMUNITY (1996): EVOLVING INSTITUTION BUILDING AND THE STRONG INVOLVEMENT OF THE ANDEAN PRESIDENTS

The AP was a step beyond the regional integration efforts already in place in South America during the 1960s. The Cartagena Agreement (CA) was created as a sub-regional integration agreement within the original Latin America Free Trade Association (LAFTA)¹ framework and was compatible with the goal of Latin American Economic Integration.² It was an attempt by some Andean countries to increase economic development through a policy of industrial development and parallel sub-regional market opening, which at that time seemed like a strategy to overcome the problems faced by the countries of the sub-region, which LAFTA could not solve.³

After its creation, the AP passed through different stages. Following an

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1. The Treaty of Montevideo 1960 established the first regional integration effort in Latin America creating the Latin American Free Trade Association (LAFTA), which was originally signed by Argentina, Brazil, Chile, Mexico, Paraguay, Peru and Uruguay. Colombia (1961), Ecuador (1961), Venezuela (1966) and Bolivia (1967) joined later.
 2. Kevin J Middlebrook, *Regional Organizations and Andean Economic Integration*, 17 J. COMMON MKT. STUD. 62, 64-65 (1978). See also William P. Avery & James D. Cochrane, *Subregional Integration in Latin America: the Andean Common Market*, 11 J. COMMON MKT. STUD. 85, 89 (1972).
 3. LAFTA involved countries with diverse levels of development, size, and political interests. The most industrialized countries (Argentina, Mexico, and Brazil) had a clear interest in securing a wider market for their products, while smaller and underdeveloped countries focused on creating industrial development. This imbalance was perceived as a disadvantage of the agreement. Rubens Antonio Barbosa, *The Evolution of the Integration Process in South America, introduction to MARTA HAINES FERRARI, THE MERCOSUR CODES XIV* (BIICL, 2000); Middlebrook, *supra* note 2, at 64-65 n.4; David E. Hojman, *The Andean Pact: Failure of a Model of Economic Integration*, 20 J. COMMON MKT. STUD. 139, 139 (1981).

important boost in the early years, the inclusion of Venezuela in 1973⁴ and the sudden abandonment of Chile in 1976⁵ marked a very difficult first decade.⁶ The political will of the member countries, or the lack of it, was one of the most important elements present or missed in the early years of the CA. The AP's original mechanisms and objectives needed strong and enduring political commitment. In order to make the whole system functional, member countries set up two main bodies, the Commission and the Board, which in the long run became influenced by the political attitude of their members.

Due to the increasing non-compliance with the Andean regulation, the lack of uniform application of the Decisions of the Andean Commission (AnC), and the inconsistent understanding of the Andean rules, the Andean Court of Justice of the CA and the Andean Parliament were created in 1979.⁷ This important move was supposed to bring to the integration process a great deal of stability and legal certainty. However, if the 1970s were immersed in volatile and controversial political environments, in the 1980s the countries in the region were shattered by the economic crisis brought about by the oil⁸ and international external debt⁹ crises.

Certainly, the 1980's ("the lost-decade"),¹⁰ had a tremendous impact on Latin American economic and social history, and obviously affected

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4. For an explanation of the overall consequences of Venezuelan late entry to the AP, see Avery & Cochrane, *supra* note 2, at 99-101; Middlebrook, *supra* note 2, at 79-80.
 5. After a military coup in 1973, Chile adopted policies incompatible with those supporting the Andean initiative. Middlebrook, *supra* note 2, at 81-82; Rafael Vargas-Hidalgo, *The Crisis of the Andean Pact: Lessons for Integration Among Developing Countries*, 17 J. COMMON MKT. STUD., 231, 223 (1979).
 6. For a comprehensive analysis of the 1974-1976 crisis of the AP, see Vargas-Hidalgo, *supra* note 5, at 213-226.
 7. The Court of Justice was established by the Treaty Creating the Court of Justice of the CA 1979, available at <http://www.sice.oas.org/Trade/Junac/Tribunal/cartageA.asp>. The Protocol amending the CA approved in Trujillo, Peru, on March 10, 1996, modified it into the Court of Justice of the Andean Community (CJAC). The Cochabamba Protocol, signed in Bolivia, on May 28, 1996, and applicable since August 1999, later modified its statute assigning to it new spheres of competence. The Andean Parliament is an attempt to create a forum for discussion of integration issues different from the other Andean bodies, which had strong governmental influence. Andean Group: Treaty Establishing the Andean Parliament, Oct. 25, 1979, 19 I.L.M. 269.
 8. For an explanation of the effects of the oil crisis on the AP, see THOMAS ANDREW O'KEEFE, *LATIN AMERICAN TRADE AGREEMENTS* 1-9 (2001); ROBERT DEVLIN & ANTONI ESTEVADEORDAL, *WHAT'S NEW IN THE NEW REGIONALISM IN THE AMERICAS?* (Inter American Development Bank (IADB), Working Paper No. 6, 2001), available at <http://www/iadb.org/intal/publicaciones/devlin-estevadeordal/WP6.pdf>; NU CEPAL, *AMÉRICA LATINA EN EL UMBRAL DE LOS AÑOS 80* (1979).
 9. For an interesting explanation of the origins and consequences of the external debt crisis, see ROSS P. BUCKLEY, *EMERGING MARKETS DEBT: AN ANALYSIS OF THE SECONDARY MARKET* 29-44 (Kluwer Academic Publishers 1999).
 10. The ECLAC called the 1980s the lost decade. The same institution called the first half of the 1990s "A lost half-decade in Latin America." Jose Antonio Ocampo, *A Lost Half-Decade in Latin America*, 149-150 *THIRD WORLD RESURGENCE* 33, 33 (2003).

the development of the AP.¹¹ However, during this devastating crisis, the Andean integration effort showed one of its more important features – its endurance and commitment to prevail despite difficulties that have impeded the development and delivery of its objectives.

At the time, member countries opted for a pragmatic approach, amending the CA through the Protocol of Quito 1987.¹² It established a new phase of the AP that would lay the foundation for the formation of an Andean sub-regional community. Member countries introduced guidelines for the institutional restructuring of the Andean Group in which regulations were relaxed to attenuate and give flexibility to the obligations originally adopted, while individual member countries implemented structural reforms based on market openness.¹³ Conscious of the consequences brought about by the external debt crisis, member countries determined, along with additional objectives of the Treaty, to reduce external vulnerability and to improve their positioning within the international economic context.¹⁴

The Quito Protocol also made some progress in the institutional field. It granted to the Commission exclusive legislative capacity in the areas of its competence¹⁵ and gave to it additional functions aimed at fostering the sub-regional integration process. As for the Board, it continued to serve as a technical body, acting as the permanent secretariat located in Lima, Peru.¹⁶ The Andean Business Advisory Council (ABAC) and the Andean Labor Advisory Council (ALAC) were also created with the core aim of gaining support from the private sector, which had profound reser-

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11. A report by the Board of the CA at that time refers that: Today the Andean Group is being subjected to adverse forces that significantly hold back its progress and seriously jeopardize the community structures built with so much effort. Currently there are problems in the field of trade liberalization, difficulties that prevent the industrialization programmes from being implemented, lack of definition on issues like the common external tariff and many instances where the commitments made in the field of legal regulations have not been fulfilled.

Permanent Secretariat of SELA, *Latin America and Caribbean Integration Schemes in the Face of the International Crisis*, available at http://www.sela.org/public_html/AA2K/EN/docs/spclxxvdi9.htm (last visited Sept. 7, 2004) (quoting BOARD OF THE CARTAGENA AGREEMENT, INSTITUTO PARA LA INTEGRACIÓN DE AMÉRICA LATINA, *ESTRATEGIAS DE DESARROLLO E INTEGRACIÓN EN EL GRUPO ANDINO* (1985)).

12. SELA, *Guide to Latin American and Caribbean Integration* 2001, at 4, available at <http://lanic.utexas.edu/~sela/AA2K1/ENG/docs/Integra/SPDi5-01/SPDi5-01-1.htm> (last visited Sept. 7, 2004) [hereinafter *Guide*] (pagination on internet may differ from hard copy); Barbosa, *supra* note 3; O'Keefe, *supra* note 8, at 1-7.
13. Barbosa, *supra* note 3; RENATO BAUMANN, ET AL., *LOS PROCESOS DE INTEGRACIÓN DE LOS PAÍSES DE AMÉRICA LATINA Y EL CARIBE 2000-2001: AVANCES, RETROCEOS Y TEMAS PENDIENTES* (United Nations, Report No. 25, 2002); O'Keefe, *supra* note 8, at 1-10.
14. Andean Pact: Official Codified Text of the Cartagena Agreement Incorporating the Quito Protocol, July 26, 1988, art. 1, 28 I.L.M. 1169, 1170 [hereinafter *Protocol of Quito*].
15. *Id.* art. 6-7, at 1172.
16. *Id.* art. 13, at 1175.

uations about the success of the AP.¹⁷

In addition, the Protocol included in the CA several programs related to services.¹⁸ The Commission was in charge of formulating them.¹⁹

Between May 1989 and December 1991, the Presidents of the Andean countries convened on nine occasions²⁰ to evaluate and try to revive the process. The impetus of the Presidents at the time ended up in the institutionalization of the Andean Presidential Council (APC) in Machu Picchu 1990²¹ – one of the most important changes in the structure of Andean integration. Since then, fifteen meetings have taken place in which core decisions were made in order to progressively deepen sub-regional integration by achieving a Free Trade Area, a Customs Union, and a Common Market.²²

Without any doubt, the introduction of the APC has contributed to the dynamism of the sub-regional integration effort during the last decade. Not only were co-related economic policies and structural reforms implemented in each member country, but strong political commitments and the direct influence by the Member countries' governments have moved the Andean scheme towards the achievement of its goals.

An overview of the efforts undertaken by the Andean leaders during the last few years, proves on the one hand, the direct influence of their political will and, on the other hand, the fragility of the process, which relies heavily on the leadership of the Andean Presidents. Due to the APC's consistent work, it only took about four years to build up a solid and efficient process towards the establishment of an FTA, an agreement on a Common External Tariff (CET) and a deadline for the establishment of the ACM.²³ Only a period of political turmoil in 1992, when Peruvian obligations were suspended, stopped the meetings of the Andean Presi-

17. Articles 19 to 21 of the CA, 1969, included a consultative committee and a social and economic advisory committee, which rarely came into the scene. Agreement on Andean Subregional Integration, May 26, 1969, Bol.-Colom.-Ecuador-Peru, 8 I.L.M. 910 [hereinafter Cartagena Agreement].

18. Protocol of Quito, *supra* note 14, art. 3, 28 I.L.M. at 1170-71.

19. *Id.* arts. 3, 51, at 1170-71, 1186-87.

20. Caracas, February 3, 1989; Cartagena, May 25 and 26, 1989; Galapagos, December 17 and 18, 1989; Machu Picchu, May 22 and 23, 1990; Lima, July 28, 1990; Bogota, August 7, 1990; La Paz, November 29 and 30, 1990; Caracas, May, 17 and 18; and Cartagena, December 3 and 5, 1991. In April 1992, Peru's membership was suspended when its President, Alberto Fujimori, abrogated the Country's Constitution and closed the Courts and Congress. The Andean Presidential meetings resumed three years afterwards in Quito on September 5, 1995.

21. See Instrument for the Creation of the Andean Presidential Council, May 23, 1990, in *Documentos de las Reuniones del Consejo Presidencial Andino*, available at <http://www.comunidadandina.org/cumbreSC/Presidentes.pdf>.

22. A complete set of the documents issued in each one of the Andean Presidential summits from 1989-2002 can be found in Spanish. Comunidad Andina Secretaria General, *Documentos De Las Reuniones Del Consejo Presidencial Andino* (2002), available at <http://www.comunidadandina.org/cumbreSC/Presidentes.pdf> (last visited Sept. 7, 2004).

23. In La Paz, Bolivia, in November 1990, the Andean Presidents established December 31, 1991, as the new deadline for forming the AFTA and defining the ACET. The previous deadline for ACM establishment was 1995.

dents affecting the speed and overall results of the process during the following years.²⁴

Notwithstanding these circumstances, progress took place after Peru's suspension. Bolivia, Colombia, and Venezuela opened their markets up on September 30, 1992. In January 1993, Ecuador opened its market to Venezuela.²⁵ Thereafter, in 1993, the Andean FTA started operating fully for all countries, except Peru.²⁶ All products were liberated, and there was no list of exceptions.

Reaching a CET has not been easy. The original CA of 1969 visualized the establishment of a CU by 1980. However, the entire process has taken fifteen years more than initially planned, delivering an incomplete CU subject to exceptions (countries, sectors, and products) and delaying its application. Through *Décision 370* on November 26, 1994, the Commission of the CA approved the CET, which started operating in February 1995. It was implemented only by Colombia, Ecuador and Venezuela while Bolivia maintained a special tariff schedule, as authorized by the Act of Barahona.²⁷ In the Santa Cruz Declaration of 2002, the Andean Presidents determined new CET levels,²⁸ and on April 14, 2003, the Andean countries completed the necessary agreements for the adoption of the Andean Community External Tariff (ACET).²⁹ However, in a meeting of the Commission of the Andean Community (CAC) in May 2004,

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24. The entire process was affected by external political factors, which happened in April 1992 and 1993. Peru's membership was suspended in 1992 when its President, Alberto Fujimori, abrogated the Country's Constitution and closed the Courts and Congress in 1992. *Decision 321: Suspensión Temporal del Peru*, IX GACETA OFICIAL DEL ACUERDO DE CARTAGENA 1, 1 (1992) [hereinafter *Decision 321*]. In addition, following impeachment procedures, Venezuelan President Carlos Andres Perez was forced to resign in 1993.
 25. *Decision 324: Arancel Externo Común, Programa de Liberación e Incentivos a las Exportaciones Intrasubregionales*, IX GACETA OFICIAL DEL ACUERDO DE CARTAGENA 3, 3-4, art. 7 (1992).
 26. On July 30, 1997, Peru and the other Andean member countries agreed on the full incorporation of Peru to the AFTA. The CAC issued *Decision 414* on July 23, 1997, decreeing that a program of liberalization would start in August of 1997 with full integration occurring by 2005. *Decision 414: Perfeccionamiento de la Integración Andina*, XII GACETA OFICIAL DEL ACUERDO DE CARTAGENA 1, 1-2, art. 1 (1997).
 27. The Andean Presidents defined a CET with four levels (5, 10, 15, and 20%) allowing Bolivia to have only two of 5% and 10%, and special conditions for the automobile sector. *Decision 370: Arancel Externo Común*, XI GACETA OFICIAL DEL ACUERDO DE CARTAGENA 1, 1, arts. 1-2 (1994). The automobile sector was the exception with a tariff of 40%. *Id.* This CET would be operative from January 1, 1992, until January 1994, the date at which it would be reduced to three levels (5, 10, and 15%), letting Bolivia keep its special conditions. All lists of exceptions would be abolished by January 1, 1993, granting special regimes for Ecuador and Bolivia. All incentives to exports would be finished by December 31, 1992. In Cartagena, Colombia in December 1991, the Presidents approved the Act of Barahona with great implications for the FTA and the CU.
 28. Bolivia, Ecuador, Peru, and Venezuela will apply a CET by December 31, 2003. ACET would be organized into four levels: 0, 5, 10, and 20. Bolivia would not apply the 20 level.
 29. Colombia, Venezuela, Ecuador and Bolivia are able to harmonize 100% of the CET, while Peru reconciles 62%. For practical purposes, the first four countries would implement *Decision 535* and Peru would apply *Decision 370*. Andean Com-

the Andean Foreign Trade Ministers unanimously agreed to postpone the effective date of the new CET established by Decision 535, until May 10, 2005. Thereafter, the Andean countries are authorized to apply tariff levels effective in each country.³⁰

In September 1995, the Andean Presidential meetings resumed even though an old border dispute between Ecuador and Peru regarding the Amazonia resurfaced that year, leading to hostilities between the two Andean countries.³¹

In 1995, a new strategic design for the CA was approved in Quito, Ecuador. The Andean Presidents took into account the international environment of increasing globalization and consolidation of regional blocks as well as the need for poverty reduction and peace in the Western Hemisphere. With that in mind, they channeled the Andean process into deeper sub-regional integration through the establishment of the ACM. At the same time, they promoted the external projection of the Andean Group in the region and in other blocks, and also consolidated and strengthened the actions related to the social and sectoral aspects of the process.

In order to adapt the Andean integration process to the changing environment of the 1990s, the Andean leaders focused on the structural reform of the AP by setting up the AIS including all bodies and institutions already in place. The New Strategic Design approved in Quito in 1995 was the basis for the Trujillo Protocol of 1996 by which the AP transformed into the AC and created the AIS³² in order to promote effective co-ordination between the different bodies and institutions (about fourteen) that comprise it.³³

The AIS is composed of: (1) the APC as the highest-level body;³⁴ (2) the Andean Council of Ministers of Foreign Affairs (ACFM) or the political leadership body;³⁵ (3) the Commission (CAC), the main policy-making body;³⁶ (4) the General Secretariat (AGS) acting as the executive

munity General Secretariat/Customs Union, *Common External Tariff*, at <http://www.comunidadandina.org/ingles/union/comon.htm> (last visited Sept. 7, 2004).

30. Press Release, Andean Community General Secretariat, Andean Ministers Agree to Postpone the Effective Date of the CET and Deepen Commercial Integration (May 5, 2004), at <http://www.comunidadandina.org/ingles/press/np5-5-04.html>.

31. On August 26, 1998, Peru and Ecuador signed the Peace Agreement and the Agreement to Accelerate and Intensify their free trade.

32. Trujillo Protocol Modifying the Andean Subregional Integration Agreement (Cartagena Agreement), Mar. 9-10, 1996, in *Documentos de las Reuniones del Consejo Presidencial Andino*, available at <http://www.comunidadandina.org/cumbreSC/Presidentes.pdf>.

33. AIS was also set up to deepen Andean sub-regional integration, promote its external presence, and consolidate and strengthen actions related to the integration process. See Cartagena Agreement, as amended by the Trujillo Protocol 1996, and codified by Decision 406, art. 7, available at <http://www.comunidadandina.org/normative/tratprot/acuerdo.htm> (last visited Sept. 7, 2004) [hereinafter Modified Cartagena Agreement].

34. *Id.* arts. 11-14.

35. *Id.* arts. 15-20.

36. *Id.* arts. 21-28.

body of the system;³⁷ (5) the Court of Justice of the AC (CJAC), the judicial body;³⁸ (6) the Andean Parliament (AP) or the deliberative body;³⁹ (7) the Advisory Institutions;⁴⁰ (8) the Financial Institutions;⁴¹ (9) Social Conventions;⁴² and finally, (10) the Simón Bolívar Andean University.⁴³

The Andean Pact was created in a period where state-led institutions and programs were influential in domestic models of development. Even though a change in the economic policies during the 1990s promoted privatization and diminution in the size of the State, and also lessened Constitutional Presidential attributions, the dependency of the Andean Community on the political will of its leaders has not changed. Furthermore, the institutions and bodies re-invented in the last reforms are still strongly influenced by the local governments with little room for private entrepreneurs.

This sense of “public ownership” of the process has kept private initiative far from convinced of the real benefits of the sub-regional scheme. Interest groups remain cynical about the achievement of the Andean aims. Their position within the Andean committees is frequently cynical, and an example of this cynicism can be found in the Andean Summit in Quirama, Colombia, in 2003.⁴⁴

This strong political control over almost all the main bodies and institutions of the IAS may be conducive to a rapid process of implementing the guidelines issued by the Andean Presidential Council, assuming there is consensus and political will. Nevertheless, the structure becomes utterly bureaucratic when the Presidential commitments are not duly and timely implemented, becoming unfulfilled promises. Due to the remaining politicization of the Andean bodies and institutions, the AIS is highly vulnerable to external shocks, such as political changes and misunderstandings among member countries.

The formally impressive AIS is still in its early stages of being fully operative. Only the rule of law will bring real balance to it. It will happen when the responsibilities of each one of the bodies and institutions comprising the AIS are clearly determined, when supranationality and

37. *Id.* arts. 29-39.

38. *Id.* arts. 40-41.

39. *Id.* arts. 42-43.

40. They are the Andean Business Advisory Council (ABAC) and the Andean Labor Advisory Council (ALAC). *Id.* art. 44.

41. They are CAF and FLAR. *Id.* arts. 45-46.

42. The social conventions are intergovernmental institutions created to complement the integration efforts in other fields different from the economic and trade sectors. These are the Hipólito Unánue created to support the member countries' efforts to improve their peoples' health and the Simón Rodríguez Convention to promote social and labour integration.

43. For more information, see Andean Community website, available at <http://www.comunidadandina.org/ingles/who/university.htm> (last visited Sept. 7, 2004).

44. Luis Carlos Villegas Echeverri, Address at Quirama, Colombia (2003), in Andres Mompotes & Carlos Salgado, *Cumbre de Incumplidos*, EL TIEMPO, June 26, 2003, at 1-2.

direct application of Andean regulation become more than a formality and when the authority of the CJCA is fully respected in every Member State. In this sense, the independent work of the Secretariat putting together coherent proposals to that end could introduce dynamism and coordination to the system.

In order to assess the changes and challenges faced by the AC upon achieving the aim of the ACM, it is essential to study the work done by the APC in this area. To that end, the next sub-section discusses the main guidelines issued by the Andean Presidents during the last seven Andean Summits.⁴⁵ Equally, it considers the work carried out to date by the bodies and institutions of the AIS.⁴⁶ Whether the AIS has been capable of creating the conditions for the smooth and timely establishment of the ACM is an issue the jury is still considering.

B. THE LONG AND WINDING ROAD TOWARDS THE ESTABLISHMENT OF THE ACM: FROM 1989 TO 2005 AND BEYOND

The establishment of the ACM can be traced back to the Galapagos Summit, December 1989. The Andean Presidents adopted a Strategic Design⁴⁷ aimed at consolidating the Andean economic area, promoting, among other six objectives, the growth of flows of capital, goods, services, and labour within the sub-region.⁴⁸ In La Paz, Bolivia, in November 1990, the Andean Presidents accelerated the integration process bringing forward the deadline for forming the FTA and defining the Andean CET. They also ordered the establishment of the ACM by 1995.⁴⁹ In Caracas, Venezuela in May 1991 and Cartagena, Colombia in December 1991, the Andean leaders carried on with the process of evaluating the achievements and imparting guidelines related to the harmonization of macroeconomic policies. However, as explained above, the entire process was affected in 1992-1993 by external political factors,⁵⁰ which lead to the suspension of the APC summits for three years, until the transformation of the AP into the AC, effective from June 3, 1997.

45. Defining sub-regional integration policy became a historical responsibility of the Andean Presidents, which finally was institutionalized, becoming part of CA, through its article 12. See a summary of the main guidelines related to the ACM in Table I in the following sub-section I.B.

46. See a summary of the main regulation related to the ACM to date in the following sub-section, Table II.

47. The Strategic Design for the Future Orientation of the Andean Group was based on two main objectives: (1) to consolidate the Andean market as an economic area; and (2) to enhance international relations of the Group within the region and with other international blocks. See *Decision 321, supra* note 24, at 39-93.

48. In relation to services, it proposed a gradual and selective liberalization of services related to the productive sector, transportation, telecommunications, and tourism. Financial services were not referred to within the text. *Id.*

49. In the Annex to the La Paz Declaration, there is a detailed plan, schedules, and programmes for the achievement of the ACM. They instructed the Andean bodies and institutions to intensify their work on harmonization of macroeconomic policies and those related to transport, telecommunications, and services, and to modify the Andean regulation related to foreign investment and Andean enterprises.

50. See *supra* note 24 and accompanying text.

From the Sucre IX Summit in 1997 onwards, the APC imparted guidelines to the different bodies and institutions of the AIS for the establishment of the ACM, shown in Table 1. The APC meets at least annually and is responsible for issuing guidelines about different matters related to Andean sub-regional integration.⁵¹ The Chairman of the APC is bound to ensure that the other AIS bodies and institutions carry out these guidelines in accordance with responsibilities and mechanisms established in their respective treaties and instruments.⁵²

What is the legal nature of these Presidential guidelines? The Treaty Creating the CJAC 1996 establishes the legal system of the AC,⁵³ which does not include the Presidential guidelines.⁵⁴ Therefore, they are not binding for member countries and should be considered as internal general frameworks establishing parameters and criteria of action for the AIS. Following Chapter II of the CA and consequently the APC being the highest-level body of the AIS, the guidelines are internally binding for all its bodies and institutions.⁵⁵

APC has entrusted CAC with the major responsibilities along with ACFM. The AGS has the gigantic task of supporting these bodies, undertaking the studies and analysis required and drafting proposals and regulations accordingly.

One of the main ACFM duties as the political leadership body is to carry out the guidelines given to it by APC and to ensure that those given to the other bodies and institutions of the AIS are performed.⁵⁶ The Council expresses itself through Declarations and Decisions adopted by consensus. Its Declarations are statements that are non-binding, while its Decisions are legally binding and therefore form part of the Andean

51. Modified Cartagena Agreement, *supra* note 33, art. 11.

52. *Id.* art. 14(c).

53. Treaty Creating the Court of Justice of the Andean Community, March 10, 1996, Bol.-Colom.-Ecuador-Peru-Venez., art. 1, available at http://www.comunidadandina.org/ingles/treaties/trea/ande_tric2.htm [hereinafter TCCJCA].

54. The legal system of the AC consists of: (1) the CA, its Protocols and additional instruments; (2) TCCJCA and its amending protocols; the Decisions of the ACFM and of the CAC; (3) the Resolutions of the AGS; and (4) the Industrial Complementarity Agreements and any such other agreements as the member countries may adopt among themselves within the context of the Andean sub-regional integration process. See Marcel Tangarife, *Sistema Jurisdiccional en el Proceso Andino, in Integración y Supranacionalidad* 157-208 (2001).

55. It is interesting to consider the legal implications of Decisions enacted beyond or in contradiction with the APC guidelines and the likelihood of declaring the nullity of them by the CJAC, which in the opinion of the author, formally, is very high. Due to the generality of the guidelines, it will be difficult to prove unless there is gross contradiction between guidelines and Decisions and Resolutions. The CJAC may declare the nullity of Decisions of the ACFM and CAC, Resolutions of the AGS, and the Agreements referred to in article 1, paragraph (e), if enacted or agreed upon in violation of the provisions comprising the legal system of the Andean Community, and even for the deviation of power. This has to be requested by a member country, ACFM, CAC, AGS, or natural or artificial persons whose rights or interests are affected as provided for in article 19 TCCJCA. See TCCJCA, *supra* note 53, at art. 17.

56. See Modified Cartagena Agreement, *supra* note 33, arts. 15-16.

Community Law governed by the Charter of the CJCA.⁵⁷ In order to achieve the best possible coordination within the AIS, the Chairman of the ACFM calls and chairs the Meetings of Representatives of the institutions that comprise the System. Among other issues, this annual meeting is set up to exchange information about the actions taken by the respective institutions to carry out the guidelines issued by the APC.⁵⁸

The ACC, in turn, is the main policy-making body.⁵⁹ It issues Decisions, sharing the legislative role with the ACFM.⁶⁰ Among other responsibilities, the ACC's must adopt the necessary measures for implementing APC guidelines.⁶¹ According to Chapter VIII, article 79 of the Cartagena agreement, as amended by the Sucre Protocol, the ACC is in charge of approving the general framework of principles and provisions for liberalising intra-sub-regional services.

This structure generates significant political and legal issues as the APC determines the general content of a future regulation, which will be discussed and enacted by bodies, formed of non-democratically elected members whose decisions will have direct application within the domestic legislation of the member countries.⁶² In fact the ACFM is made up of the Ministers of Foreign Affairs of the member countries, and the ACC is composed of a plenipotentiary representative from each one of the member governments. Their composition depends entirely on the will, interest and ideology of the local governments. As establishing a Common Market implies regulating broader areas than those related to an FTA of a CU, the AC's design might bring unrest to domestic political parties supporting or in opposition, and to interest groups when the Andean regulation starts affecting them.

Table II shows the main Andean regulation related to the ACM. The AIS has yielded important achievements in the area of liberalization of services. In 1998 the General Framework of Principles and Provisions for Liberalising Trade in Services in the Andean Community was approved, and three years later in 2001, the CAC finally adopted the Inventory of Measures Restricting Trade in Services. Areas such as trade in telecommunications, intellectual property, the development and integration of tourism and tax harmonisation have received a great deal of attention. However, the process has been rather slow and laborious.

57. *Id.* arts. 17-18. Decisions become binding for member countries as of the date they are approved by the ACFM or the CAC. See TCCJCA, *supra* note 53, art. 2. These Decisions and Resolutions of the AGS are directly applicable in member countries as of the date they are published in the Official Gazette of the Agreement, unless they indicate a later date. See also *id.* art. 3.

58. Modified Cartagena Agreement, *supra* note 33, art. 9.

59. *Id.* arts. 21-28.

60. *Id.* art. 21.

61. *Id.* art. 22.

62. See Andres Franco, *Propiedades de la Política Exterior de los Países Miembros de la Comunidad Andina*, in *HACIA UNA POLÍTICA EXTERIOR COMÚN DE LA COMUNIDAD ANDINA* 236 (Jeannette Sánchez Naranjo ed., 1999).

During its existence, the Andean scheme reveals a recurrent tendency to establish time limits which seem reasonable to the setters but are not complied with. Inadequate planning and the establishment of unrealistic targets are also features present within the process of integration, which bring imbalances among the bodies and institutions of the AIS, imposing on some of them tremendous amounts of work and responsibilities without proper funding⁶³ and structural support. It gives a sense of improvisation and unreliability to the Andean citizenry.

As shown in Table II, the establishment of the ACM has become a heavy burden on CAC and AGS. Compare Table I (Presidential guidelines) with Table II (regulation in place). While the APC keeps reaffirming the commitment towards the ACM by 2005, there are areas such as movement of capital (regulation dating from 1991), liberalization of financial services (none) and circulation of persons (with some exceptions) in which AIS has not yet delivered meaningful results. It was expected that by the APC Summit held in Cuenca, Ecuador, in July 2004, regulation related to the liberalization of Financial Services and other sectors would be enacted. But it was not.

Trade in services, capital and labour is still nascent within the AC. The Andean regulation is in the process of being drafted and issued with limited participation of the private sector.⁶⁴ Therefore, the domestic implementation of the binding supranational Andean regulation may produce a certain degree of resistance, as the consequences of an enhanced Andean market for capital, services and labour are far from clear to and not entirely assessed by the private sector. In addition to their historically cynical approach to the Andean scheme, interest groups seem to be distracted by the on-going negotiations of PTAs with stronger non-members. This is certainly not an optimal environment for the successful achievement of the ACM.

Table I contains the APC guidelines for the establishment of the ACM. Column 1 details the year of the APC Summit and the major declaration (Act) issued by the Andean Presidents. The following columns display the main responsibilities given to CAC, AGS, ACFM, ACTM/CB/CBA and other bodies of the AIS by the APC.

63. In March 2004, AC celebrated a cooperation agreement with the IDB. An amount of \$250,000 will be destined, together with funds from the AC member countries, to bring technical support to the negotiations of the PTAs with the United States and the FTAA. See Press Release, CAN Achieves BID's Cooperation in Support of Andean Countries' Commercial Negotiations (Mar. 3, 2004), available at <http://www.comunidadandina.org/ingles/press/np3-3-04.htm>. Similar cooperation agreements have been signed with CAF (May 2004) for \$194,000 to support commercial negotiations. See <http://www.comunidadandina.org/prensa/notas/np24-5-04a.htm>. These are indeed important developments in support of these processes.

64. AGS has carried on important efforts to that end. For instance, on March 30, 2004, it invited Andean bankers to be informed and to express their opinions about the process towards financial integration and the regulation drafted. See Press Release, Wagner Invoca a Banqueros a Impulsar la Integración Financiera en la CAN (Mar. 30, 2004), available at <http://www.comunidadandina.org/prensa/notas/np30-3-04.htm>.

Table II shows the results of the work of the CAC and ACFM, naming the main Andean regulation actually in place, enacted by these bodies in the areas of Services, Investment, Labour and Taxation.

III. THE CHANGES AND CHALLENGES IMPOSED ON THE AC BY THE IMPLEMENTATION OF THE POLICY OF OPEN REGIONALISM

As a consequence of the domestic structural reforms starting in the 1980s and carried out during the 1990s, a certain degree of policy harmonization in the macroeconomic and trade areas took place in Latin America, boosting economic interdependence. The "consolidation of a coherent, stable macroeconomic framework, unilateral trade liberalization, non-discriminatory promotion of exports, deregulation and elimination of obstacles to foreign investment, privatizations and the lifting of payment restrictions"⁶⁵ were similar tendencies that configured what is called by ECLAC⁶⁶ *de facto* integration.⁶⁷ This process did not require any kind of negotiations among the Andean countries within the framework of the CA. It was negotiated unilaterally with multilateral international institutions with the aim of bringing stability to the local economies according to each country's needs.⁶⁸ This "strategy," conceived by G-10 and implemented by multilateral international institutions, was further strengthened in order to prevent economic crises with the capability of threatening international financial stability due to the different crises still erupting in developing countries during the 1990s.⁶⁹

65. ECLAC, *Open Regionalism in Latin America and the Caribbean: Economic Integration as a Contribution to Changing Production Patterns with Social Equity*, § 2(b)(17), available at <http://www.eclac.cl/publicaciones/SecretariaEjecutiva/1/lcg1801/lcg1801i.html> (last visited Sept. 7, 2004) [hereinafter *Open Regionalism*]. See also GARY C. HUFBAUER & BARBARA KOTSCHWAR, *THE FUTURE OF REGIONAL TRADING ARRANGEMENTS IN THE WESTERN HEMISPHERE* (Institute for International Economics, 1998), available at <http://www.sicc.oas.org/geograph/papers/iie/hufbauer0998.asp>. See also *Guide*, *supra* note 12, at 9. For further explanations related to the broader concept of "new regionalism", see DEVLIN & ESTEVADEORDAL, *supra* note 8; CEPAL, *supra* note 8.

66. ECLAC is the United Nations Economic Commission for Latin America and the Caribbean. Its Spanish acronym is CEPAL. ECLAC has developed its own school of thought being extremely influential within the region. See ECLAC website, available at <http://www.eclac.cl/acerca/default-i.asp> (last visited Sept. 7, 2004).

67. See *Open Regionalism*, *supra* note 65.

68. See *Guide*, *supra* note 12, at 8-11.

69. See GROUP OF TEN, *FINANCIAL STABILITY IN EMERGING MARKET ECONOMIES* (Bank for International Settlements, 1997), at <http://www.bis.org/publ/gten02.pdf> (last visited Sept. 7, 2004). See also MORRIS GOLDSTEIN & PHILIP TURNER, *BANKING CRISES IN EMERGING ECONOMIES: ORIGINS AND POLICY OPTIONS* (Bank for International Settlements, Paper No. 46, 1996), available at <http://www.bis.org/publ/econ46.pdf> (last visited Sept. 7, 2004). See Stephany Griffith Jones, *Developing Countries and Global Financial Systems*, available at <http://www.ids.ac.uk/ids/global/Conf/pdfs/GFA.pdf> (June 22-23, 2000); World Bank Group, *Reports of the Observance of Standards and Codes (ROSCs)*, available at http://www.worldbank.org/ifa/rosc_more.html (last visited Sept. 7, 2004).

TABLE I. APC GUIDELINES FOR THE ESTABLISHMENT OF THE ACM

APC	CAC	AGS	ACFM	ACTEM/CB/EPA	Other bodies
SUCRE 1997 IX APC Act of Sucre and Sucre Protocol	To propose and carry on what is needed to establish the ACM	To study air and maritime regulation and to propose to the ACC rules related to it	To work in the field of free movement of persons with Andean Ministers of For- eign Affairs and a group of experts in the field set up with this specific aim	Created by the APC with the mandate of working on the harmonisation of macroeconomic policies (deadline October 1997)	Ministers of Education Recognition of academic degrees in the sub-region
	To set up the general framework of principles and rules in order to liber- alise and expand the mar- ket of services (given ninety days to do so)	To propose to ACC the general framework of prin- ciples and rules in order to liberalise and expand the market of services			
	To analyse sectors in which liberalisation could be accelerated				
GUAYAQUIL 1998 X APC Act of Guayaquil	To work in the adoption of a general framework of principles and rules for liberalising trade in ser- vices, (accomplished through Decision 439, 11 July 1998)	To propose the general parameters to gain and deepen Andean integration geared towards the estab- lishment of ACM (Dead- line to draft a first document, July 1998)	To propose the general parameters to gain and deepen Andean integration geared towards the estab- lishment of ACM	To co-ordinate efforts in order to advance in the integration of financial and capital markets and to maintain sound, safe and competitive financial sys- tems	Creation of the ANDEAN ENTREPRENEURIAL FORUM
	To adopt regulation related to the promotion and pro- tection of sub-regional investment, before the next Summit To update regulation related to Foreign Invest- ment	To assess the issues related to the facilitation of move- ment of persons within the Sub-region and to present proposals in order to over- come difficulties	To work on the facilitation of movement of persons within the Sub-region	To seek coordination and convergence of macroeconomic policies of the country members to secure prize stability, macroeconomic equilibrium and the increment of employment and income of the population	

TABLE I. APC GUIDELINES FOR THE ESTABLISHMENT OF THE ACM (continuation)

APC	CAC	AGS	ACFM	ACTFM/CB/EPA	Other bodies
	To establish transparent procedures in the area of government procurement and to grant under equally competitive conditions, national treatment to member countries' goods, services and suppliers	To support the ACFM		To elaborate an agenda for the harmonisation of exchange, monetary, financial and fiscal policies	
	To work on a Common Agricultural Policy	To propose rules to avoid double taxation			
CARTAGENA 1999 XI APC Act of Cartagena The establishment of the ACM by 2005	To prepare a draft Protocol with the commitments and timetables for the formation of the ACM	To work with the Andean Committee of Authorities of Tourism on the elaboration of a programme of tourism development	To prepare a draft Protocol with the commitments and timetables for the formation of the ACM	To prepare a draft Protocol with the commitments and timetables for the formation of the ACM	
	To study changes in the AIS and the creation of an Economic Council		To study changes in the AIS and the creation of an Economic Council	To move forward towards the establishment of criteria for achieving macroeconomic convergence	
	To accelerate the work towards the establishment of Andean regulation related to the promotion and protection of investment, double taxation and indirect taxation		To accelerate the work towards the establishment of Andean regulation related to the promotion and protection of investment, double taxation and indirect taxation	To accelerate the work towards the establishment of Andean regulation related to the promotion and protection of investment, double taxation and indirect taxation	

TABLE I. APC GUIDELINES FOR THE ESTABLISHMENT OF THE ACM (continuation)

APC	CAC	AGS	ACFM	ACTFM/CB/EPA	Other bodies
	To work on a Common Agricultural Policy			To work with the Andean Committee on Migrations in the definition of a schedule for the harmonisation, simplification and unification of migratory procedures and other related issues	The Andean Committee on Migrations The Andean Committee of Authorities of Tourism
LIMA 2000 XII APC Act of Lima Annexes I, II, III Actions towards the establishment of ACM	Entrusted in coordination with ACFM, with the task of leading politically the process of establishing the ACM in the areas of trade and investment		Entrusted in coordination with ACC with the task of leading politically the process of establishing the ACM in the areas of trade and investment		Ministers of Foreign Relations to adopt the actions needed to harmonise domestic regulation and to reform judiciary Central Banks concerted work and harmonisation of macroeconomic policies
			To evaluate the achievements in the implementation of specific objectives and actions set up by the APC in Annexes I, II, III, in order to establish the ACM		
VALENCIA 2001 XIII APC Act of Carabobo	To accelerate the implementation of the guidelines contained in the Act of Lima and to report on it in the following summit of the APC	In coordination with the Andean Committee on Migrations, to propose to the ACFM not later than December 2001, regulation related to harmonising rules regarding student migrations, businessmen, investors, artists and sportsmen. To determine technicalities related to the Andean Passport	To accelerate the implementation of the guidelines contained in the Act of Lima and to report on it to the APC in the following Summit	To establish a mechanism to monitor the compliance with the macroeconomic goals set up by ACTFM/CB/EPA	The Andean Committee on Migrations and AGS To propose to the ACFM not later than December 2001, regulation related to harmonising rules regarding student migrations, businessmen, investors, artists and sportsmen. To determine technicalities related to the Andean Passport

TABLE I. APC GUIDELINES FOR THE ESTABLISHMENT OF THE ACM (continuation)

APC	CAC	AGS	ACFM	ACTFM/CB/EPA	Other bodies
	To make progress in the liberalisation of Services, in the achievement of a Common Agricultural Policy and a Common Regime of Government Procurement	To carry on working in the area of tourism jointly with the Andean Committee of Authorities of Tourism			Ministers of Education and ACC. To establish Decisions aimed at simplifying and harmonising requirements to validate professional and postgraduate degrees
	To establish Decisions aimed at simplifying and harmonising requirements to validate professional and postgraduate degrees, in cooperation with the Ministers of Education	To support and strengthen the Andean Statistical Information System, specially in the areas of investment, services, social development and the informal sector of the economy			The Andean Committee of Authorities of Tourism and the AGS. To carry on working in the area of tourism
QUIRAMA XIV APC Act of Quirama	To work with the Ministers of Agriculture on a Common Agricultural Policy (deadline 30 September 2003)	To establish a game plan for the liberalisation of services (deadline 30 September 2003)	To support and strengthen the AIS, promoting sectoral meetings of the member countries' Ministers to analyse, to make proposals and to participate in the debates within the AIS		The Court of Justice of the Andean Community. To propose jointly with the AGS mechanisms to seek extra-judicial conflict resolution
	To support and strengthen the AIS, promoting sectoral meetings of the member countries' Ministers to analyse, to make proposals and to participate in the debates within the AIS	To propose jointly with the Court of Justice of the Andean Community mechanisms to seek extra-judicial conflict resolution			

TABLE II. MAIN ANDEAN REGULATION RELATED TO THE ACM

Subject	CAC	ACFM
Services	Decision 439 July 11, 1998. General Framework of Principles and Provisions for Liberalising Trade in Services in the Andean Community Decision 510 October 31, 2001. Adoption of the Inventory of Measures Restricting the Trade in Services	
Liberalisation of trade in telecommunications	Decision 462 May 1999, to deregulate all telecommunication services, with the exception of sound radio and television broadcasting, as of January 1, 2002 Other relevant Decisions: Decision 395, Decision 429, Decision 479, Decision 480; and Decision 509	
Intellectual Property	Decision 486, September 14, 2000, Common Intellectual Property Regime establishing a Common Industrial Property System; Decision 351, December 17, 1993, Common Provisions on Copyright and Neighbouring Rights (of December 17, 1993) Decision 345, October 1993, The Regime for Protection of the Rights of Obtentors of new Plant Varieties Decision 391, July 2 1996, Common Regime on Access to Genetic Resources	
The development and integration of tourism	Decision 463, 1999, Regime for the Development and Integration of Tourism in the Andean Community. It rests on three pillars: liberalisation of tourist services, execution of tourist projects of Community interest, and removal of obstacles to the movement of tourists in the Sub-region Decision 498, March 30, 2001, establishes May 24 as the Andean Tourism Day	Decision 503, June 22 2001, recognises from January 1, 2002, national identification documents as the only requirement for tourist traveling among the Sub-region's five countries
Investment	Decision 291 of 1991, Regime for the Common Treatment of Foreign Capital and Trademarks, Patents, Licensing Agreements and Royalties Decision 292 of 1991, regulates the case of the Andean multinational enterprises	

TABLE II. MAIN ANDEAN REGULATION RELATED TO THE ACM (continuation)

Subject	CAC	ACFM
Tax harmonisation	<p>Indirect Taxes Decision 330 of October 1992 Decision 388 of July 1996 Double Taxation Decision 40 Approval of the Agreement among Member Countries to avoid double taxation and of the Standard Agreement for executing agreements on double taxation between Member Countries and other States outside the Sub-region Decision 578, May 4, 2004. To avoid double taxation and to prevent Tax Evasion</p>	
Transportation and Infrastructure	<p>Decision 398, January 17, 1997, International Passenger Transportation by Road; Decision 399; January 17, 1997, International Transportation of Merchandise by Road, Decision 288, March 21 1991, Freedom of access to Cargo Originated in and Intended for Shipment by sea within the Subregion, Decision 297, May 16, 1991, Integration of Air Transport in the Andean Subregion, Decisions 331, March 4, 1993, and Decision 393, regulating Multimodal Transportation Other relevant Decisions: Decision 185; Decision 224; Decision 257; Decision 271; Decision 277; Decision 289; Decision 526; Decision 290; Decision 314; Decision 320; Decision 359; Decision 289; Decision 314; Decision 360; Decision 361; Decision 390; Decision 467; Decision 491; Decision 561.</p>	
Energy Sector	<p>Decision 557, June 25, 2003 created the Council of Andean Community Ministers of Energy, Electricity, Hydrocarbons and Mines Decision 536, December 19 2002, the General Framework establishing the rules for the sub-regional interconnection of the electric systems and the exchange of electricity among the Andean Community Member Countries</p>	

TABLE II. MAIN ANDEAN REGULATION RELATED TO THE ACM (continuation)

Subject	CAC	ACFM
Circulation of Persons	Decision 397, August 3, 1996, Andean Migration Card (TAM) Contents and format of the TAM	Decision 503, June 22, 2001, recognises national identification documents as the sole requisite for tourist travel in the sub-region by national and foreign residents of the Member Countries Decision 504, June 22, 2001, Creation of the Andean Passport starting December 31, 2005. Decision 526, July 7, 2002, Airport incoming immigration formality booths for nationals and foreign residents of Member Countries Decision 545, June 25, 2003, Andean Labor Migration Decision 546, June 25, 2003, Social Security instruments restricted to workers Other related Decisions: Decision 584, Decision 583, Decision 554, Decision 553, Decision 552, Decision 551, Decision 550, Decision 549, Decision 548, Decision 547, Decision 504, Decision 397, Decision 148, Decision 116, Decision 113
Transportation and Infrastructure	Decision 398, January 17, 1997, International Passenger Transportation by Road; Decision 399, January 17, 1997, International Transportation of Merchandise by Road, Decision 288, March 21 1991, Freedom of access to Cargo Originated in and Intended for Shipment by sea within the Subregion, Decision 297, May 16, 1991, Integration of Air Transport in the Andean Subregion, Decisions 331, March 4, 1993, and Decision 393, regulating Multimodal Transportation Other relevant Decisions: Decision 185; Decision 224; Decision 257; Decision 271; Decision 277; Decision 289; Decision 526; Decision 290; Decision 314; Decision 320; Decision 359; Decision 289; Decision 314; Decision 360; Decision 361; Decision 390; Decision 467; Decision 491; Decision 561.	
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TABLE II. MAIN ANDEAN REGULATION RELATED TO THE ACM (continuation)

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The resulting need to open markets to foreign trade invigorated integration schemes during the late 1990s. As countries in the region shared the same market-oriented economic policies, "the impact of concessions given to each other was not very different from the concessions given to third countries."⁷⁰ In this sense, bilateral and trilateral arrangements appeared as well as several preferential trade arrangements. For instance, PSAs provided for in the Montevideo Treaty of 1980 brought about MERCOSUR.⁷¹ Reciprocal FTAs were negotiated mainly by Chile and between sub-regional schemes. The establishment of the G-3 between Colombia, Mexico and Venezuela is another example.

All these circumstances gave rise to what is defined by ECLAC as "Open regionalism." As stated by this institution, it is:

[A] process of growing economic interdependence at the regional level, promoted both by preferential integration agreements and by other policies in a context of liberalization and deregulation, geared towards enhancing the competitiveness of the countries of the region and, in so far as possible, constituting the building blocks for a more open and transparent international economy.⁷²

Open regionalism contains two antithetical propositions.⁷³ On the one hand, it advocates regional integration as opposed to multilateral or global integration. Regionalism implies certain preferences among the members and a degree of protection against non-members. On the other, it proposes openness to other countries, blocks and economies through different means, among them, multilateralism.

This two-folded definition implies an enormous degree of multiple interactions.⁷⁴ First of all, there are interactions within the countries of the sub-region. Secondly, there are interactions with non-members and with other arrangements or regional schemes which could be negotiated and agreed in blocks or individually. Additionally, there is a high degree of difficulty in finding the right balance among the particular concerns and interest of the Andean member countries and those of the Latin American region as a whole when negotiating with other countries (such as the United States) and blocks (i.e. the European Union).

70. See *Guide*, *supra* note 12, at 24.

71. See *id.* at 62. See also O'KEEFE, *supra* note 8, 1-11.

72. *Open Regionalism*, *supra* note 65, para. 7. See also *Guide*, *supra* note 12, at 9. See also Shahid Javed Burki & Guillermo E. Perry, *Towards Open Regionalism*, in *TRADE: TOWARDS OPEN REGIONALISM – PROCEEDINGS OF AN ANNUAL WORLD BANK CONFERENCE 3-9* (Shahid Javed Burki et al. eds., 1998).

73. Eduardo Mayobre, *The Rules of the World Game in Latin America's Foreign Policy*, 53 *CAPITULOS DEL SELA* 51, 60 (1998) (commenting on the concept of open regionalism). See also Percy S. Mistry, *Open Regionalism: Stepping Stone or Millstone toward an Improved Multilateral System?*, in *REGIONALISM AND THE GLOBAL ECONOMY: THE CASE OF LATIN AMERICA AND THE CARIBBEAN 11-18* (Jan Joost Teunissen, ed., FONDAD 1995).

74. See SELA's Permanent Secretariat, *Some Thoughts of the Dynamics on Latin America's and the Caribbean's External Relations*, 55 *CAPITULOS DEL SELA* 7, 8-9 (1999) (discussing the implications of open regionalism), available at <http://lanic.utexas.edu/~sela/AA2K/ES/cap/N55/rcap55-1.htm> (last visited Sept. 7, 2004).

A. LEGAL AND INSTITUTIONAL EFFECTS OF THE POLICY OF OPEN
REGIONALISM AND ITS ARTICULATION WITHIN THE AC LAW
AND THE AIS: FIXING A HOLE

1. Legal Development

As seen in section I, the AP was conceived as an inner-looking integration agreement which did not encourage open trade with non-members, at least, in its early stages. This feature was included in the drafting of the original CA. Even though the AP was established within LAFTA's framework aimed at encouraging Latin American integration, article 68 obliged member countries to consult to the AnC before unilaterally granting any tariff preference to non-members in the region.⁷⁵ With this mechanism, the AP wanted to promote coordination among its members, as negotiations at the time were generally conducted on a bilateral basis (member/non-member) and not as a bloc.⁷⁶

As a consequence of the economic crisis of the 1980s, Andean countries started looking for other markets and engaging in bilateral agreements with non-members under LAIA's umbrella. These actions affected the cohesion of the AP. In the early 1990s, before the AP embraced open regionalism, the Andean Presidents allowed a certain degree of openness, at least towards the Caribbean countries and those within the region, while at the same time imposing discipline on the members. Through the Act of Barahona in 1991, the Andean Presidents established that negotiations with Latin American and Caribbean countries should preferably be of a communal nature. However, the Presidents considered any bilateral negotiations acceptable when it was impossible to negotiate as a block.⁷⁷ The AnC adopted this guideline with Decision 322 on August 25, 1992.⁷⁸ It was the legal basis for the negotiations between Colombia, Mexico and Venezuela for the creation of the G-3 and the origin of a period of increasing commitments with non-members.

At the same time, as seen above in section I.A., the Andean leaders started shaping, Summit by Summit, the features of the Andean integra-

75. See Victor Rico Frontaura, *La Coordinación y Negociación de los Países de la Comunidad Andina en el Marco del ALCA y la OMC*, available at http://www.iadb.org/intal/publicaciones/Rico_DD-IECI-01.pdf, (last visited Sept. 7, 2004). See also, EDGAR MONCAYO JIMÉNEZ, *LAS RELACIONES EXTERNAS DE LA COMUNIDAD ANDINA: ENTRE LA GLOBALIZACIÓN Y EL REGIONALISMO ABIERTO* (1999); *HACIA UNA POLÍTICA EXTERIOR COMÚN DE LA COMUNIDAD ANDINA*, *supra* note 62.

76. The actual CA article 86 regulates the subject obliging member countries not to unilaterally alter the customs duties set in the CET and to hold consultations with CAC before assuming tariff obligations with countries outside the sub-region. Modified Cartagena Agreement, *supra* note 33, art. 86.

77. Act of Barahona, Dec. 3-5, 1991, Bol.-Colom.-Ecuador-Peru-Venez., available at http://www.sice.oas.org/Trade/Junac/Vlacta_s.asp.

78. It allows member countries to advance their bilateral negotiations with other countries in the region, provided that at least two members of the Andean Group are involved. Andean Community, *Decision 322: Trade Relations with the Countries of ALADI and of Central America and the Caribbean*, available at <http://www.comunidadandina.org/ingles/treaties/dec/D322e.htm> (Dec. 5, 1991).

tion until it became the AC. Within this progressive work, the APC developed the basis for the creation of an Andean Common External Policy whose structure was included in Chapter III of the CA through the Sucre Protocol 1997.

2. Institutional Effects

ACFM is in charge of formulating the Andean Common Foreign Policy (ACFP) on matters that are of interest to the sub-region.⁷⁹ ACFM and CAC are also entrusted with defining and implementing a community strategy aimed at deepening integration with other economic blocks in the region and establishing political, social and economic-trade relations with other groups outside the region.⁸⁰ ACFM and CAC can coordinate joint negotiations of the AC with other integration processes or with third countries or groups of countries.⁸¹ They can also instruct the AGS to perform research, studies and activities that will make it possible to achieve the objective stated in Chapter III of CA and to carry out the measures needed.⁸²

Even though the AC has international legal capacity or status,⁸³ the individual Presidents of the member countries or their representatives have signed all economic agreements (PTAs) with non-members. This will continue until this legal capacity is clearly defined and allocated within AIS. At the same time, although it makes sense to entrust the Ministers of Foreign Affairs with formulating the overall ACFP,⁸⁴ economic integration agreements are mainly related to trade. It supposes at least the primary involvement of the Ministers of Trade of the Member countries. However, they do not have a relevant formal role in the formulation of the Andean strategy and under the formal CA they are not the main coordinators of the negotiations with third countries or blocks, being under the leadership of the Ministers of Foreign Affairs and the members of the CAC. Furthermore, as a result of the institutional design, CAC and AGS are overwhelmed with additional responsibilities as there are several agreements under simultaneous negotiation and implementation, apart from the demanding duties related to the establishment of the ACM. Finally, the AIS keeps making the same mistake of not including

79. Modified Cartagena Agreement, *supra* note 33, art. 50.

80. *Id.* art. 51.

81. *Id.* art. 52(b).

82. *Id.* art. 52(c).

83. *Id.* art. 48.

84. See Andean Community, *Decision 458: Common Foreign Policy Guidelines*, available at <http://www.comunidadandina.org/ingles/treaties/dec/D458e.htm> (May 25, 1999). See also Andean Community, *Decision 475: Directive No. 1 of the Common Foreign Policy*, available at <http://www.comunidadandina.org> (last visited Sept. 1, 2004); Andean Community, *Decision 476: Follow-up of the Common Foreign Policy*, available at <http://www.comunidadandina.org/ingles/treaties/dec/D476e.htm> (Apr. 27, 2000); Andean Community, *Decision 499: Updating of Directive 1 on the Formulation and Execution of the Common Foreign Policy*, available at <http://www.comunidadandina.org/ingles/treaties/dec/D499e.htm> (June 22, 2001).

the private sector when designing common strategies and coordinating negotiations, confirming its nature of being a government-lead scheme.

The final result for the AC is its inability to have a strong strategy able to support the policy of open regionalism recurrently advocated by the Andean Presidents. In the middle of several simultaneous negotiations the counter-party has found the Andean's Achilles Heel: its nascent and shy common external policy. The possibilities of acting as a block are minimal if each country is invited to negotiate individually by a party which understands the benefits of negotiating with counter-parties with weak bargaining power.

The AGS introduced the concept of variable geometries in an attempt to uphold Andean cohesion within an environment of increasing expectations towards agreements with non-members.⁸⁵ It means that "within the context of a legal system generally characterized by equal rights and duties to its members and by unitary legal regime, room is left open for special arrangements chosen by the members and granted to them under special circumstances."⁸⁶ However, this flexible framework for channeling contrasting interests requires not only a high degree of sense of community, but also strong institutions and rule of law, which are not present in the AC yet.

Within this context of lacking a clear and effective common strategy, Andean member countries actually are engaged in further negotiations towards the establishment of South-South and North-South-PTAs.⁸⁷ The following sub-sections address some of the main treaties in place or under negotiation and make some comments on the role of the AIS and the possible consequences of their implementation on the AC's nature and future existence as a bloc.

B. THE GROUP OF THREE (G-3): COLOMBIA, MEXICO AND VENEZUELA

Colombia, Mexico and Venezuela entered into a treaty on free trade in accordance with the GATT, conferring upon it the nature of a PSECA under LAIA's framework.⁸⁸ As for liberalization of trade in goods, the G-3 agreement is based on a linear and automatic tariff reduction pro-

85. Guillermo Fernandez de Soto, General Secretary of the Andean Community, Address at the XIV APC (June 27, 2003), available at http://www.comunidadandina.org/rionegro/dis_Fernandez.htm.

86. See Daniel Thürer, *A Variable Geometry for Europe*, at 4-5, available at http://www.edu365.com/aulanet/comsoc/treballsrecerca/treballs_04_05/treballs_geom_countr/variable.pdf (last visited Sept. 7, 2004).

87. For an excellent assessment on Latin American regionalism, see IDB, *Más Allá de las Fronteras: El Nuevo Regionalismo en America Latina*, available at http://www.iadb.org/res/publications/pubfiles/pubB-2002S_4060.pdf (last visited Sept. 7, 2004). For a general study of regionalism, see World Bank, *Trade Blocs*, available at http://www.worldbank.org/research/trade/pdf/trade_blocs2.pdf (last visited Sept. 7, 2004).

88. See 1980 Montevideo Treaty, Aug. 12, 1980, art. 11, available at <http://www.sice.oas.org/trade/montev%5Ftr/Montev%5Fle.asp#intro>.

gram of 10 percent per year until the full completion of a FTA by mid 2004.⁸⁹ The G-3 agreement acknowledges that Colombia and Venezuela are members of the CA by establishing special rules in article 1-03 pertaining to the two countries.⁹⁰ However, it is important to note that after three years of negotiations and discussions based upon different approaches and structures, the final agreement was strongly influenced by NAFTA, including sectors such as services, investment, government procurement and intellectual property. None of these subjects were negotiated before in the previous Latin American South-South regional, sub-regional, or bilateral PTAs.⁹¹ For instance, article X of the agreement establishes the general principles applicable to the trade of services, and article XII focuses on trade in financial services. As little research has been done in these areas, gradual implementation will be conducive to a better understanding of these special regimes and their consequences within the domestic legal frameworks of the members. The objectives of the G-3 are based on the principles of national treatment, most-favoured nation treatment, and transparency.⁹² The agreement has been formally successful regarding the implementation of the gradual tariff reductions. By July 2004, a great deal of sectors will be fully open. The achievement of a complete G-3 FTA will not collide with the Andean regulation, as the Andean CET was suspended until March 2005.

In addition, the completion of the G-3 FTA may also contribute to changing the economic environment of the Andean countries. Colombia and Venezuela have become major trading partners within the AC. At the same time, there is increasing interest by Colombian and Venezuelan exporters to reach the Mexican market. The situation is challenging however due to Mexico's stronger position in technology and infrastructure.⁹³

89. There are some products under special tariff reduction frameworks (soap and automobiles). See SANDRA ZULUAGA & OLGA LUCIA LOZANO, *EL GRUPO DE LOS TRES (G-3): LAS NEGACIONES COMERCIALES ENTRE COLOMBIA, MÉXICO Y VENEZUELA* [The Group of Three (G-3), the Commercial Negotiations Between Colombia, Mexico and Venezuela] 181 (Antoni Estevadeordal & Carolyn Robert eds., 2001).

90. Articles III, IV, V (section A), VI, VIII, IX, XVI, and XVIII of the G-3 Treaty do not apply to those two countries. As such, G-3 recognizes the different obligations acquired by its members in each one of the referred agreements. However, article 1-02,2 specifies that in the event of inconsistency between provisions of these treaties and agreements and the provisions of the Treaty, G-3 prevail to the extent of the inconsistency. Treaty on Free Trade Between the Republic of Colombia, the Republic of Venezuela and the United Mexican States, available at http://www.sice.oas.org/Trade/G3_E/G3E_TOC.asp (last visited Sept. 7, 2004) [hereinafter G-3 Treaty].

91. The agreement was originally conceived under the traditional LAIA framework, establishing a coherent schedule for progressive tariff reductions. Equally, it was thought to include all AP member countries at the time. See ZULUAGA & LOZANO, *supra* note 89, at 163-65.

92. See G-3 Treaty, *supra* note 90, art. 1-01.

93. The Colombian automobile industry is already feeling pressure as tariff reductions are going to cover this sector soon. Competing against Mexican producers will be very difficult. Voices seeking for postponing deadlines are starting to speak loudly to the Colombian government. Will it listen? See *La Prisa del TLC es de E.U.*, EL

Finally it is important to underline the AC's failure to act as a block in achieving a 5 + 1 agreement during the negotiation process⁹⁴ as well as the absence of interest by the remaining Andean partners to join the G-3 as a bloc. Bolivia has an independent FTA with Mexico similar in structure to the G-3. Peru and Ecuador have not started any negotiations yet.

C. THE ESTABLISHMENT OF A CAN-MERCOSUR FTA, THE PROCESS TOWARDS ACTING WITH A SINGLE VOICE

The stages concerning the formation of a FTA between CAN and MERCOSUR have been complex and have extended for a long period of time. During the mid 1990s some Andean countries proposed negotiating an agreement similar to the G-3 proposal rejected by MERCOSUR, which favoured a scheme relating only to the trade of goods.⁹⁵

In the meantime, MERCOSUR and Bolivia signed the ECA No. 36 on December 17, 1996, under LAIA's framework.⁹⁶ Within the ECA's objectives established in article 1, the contracting parties committed to setting up an FTA within ten years, starting in 1997. To that end, the contracting parties set up a detailed program of trade liberalization, regulated in Section II, and a framework of rules aimed at facilitating gradual trade liberalisation and dispute settlement. Even though it does not regulate trade in services as set forth, article 33 indicates that the contracting parties will promote trade regulations according to WTO regulations.

Changing its position, the remaining countries signed a PTA with MERCOSUR on April 16, 1998, the PSA AAP.A14TM No. 11, which set up the framework for the creation of an FTA between these two blocks, negotiating first the preferences given under the ALADI's framework and establishing further progressive agreements in the future.

Peru, Ecuador, Colombia and Venezuela (as members of the Andean Community) signed a PSECA No. 39 with Brazil under LAIA's framework on August 12, 1999.⁹⁷ This agreement was aimed at establishing fixed preferences among the contracting parties as a first step towards the conformation of an FTA. It also set up a commission integrated by representatives of certain institutions detailed in article 18, which is in charge of its administration. Peru, Ecuador, Colombia and Venezuela (as mem-

TIEMPO, June 3, 2004, at 1-11; *Arranca Renegociacion de G-3*, EL TIEMPO – PORTAFOLIO, June 11, 2004, at 6.

94. It was mainly due to the lack special treatment to the less developed Andean partners and the broader agenda proposed by Mexico at the time. See ZULUAGA & LOZANO, *supra* note 89, at 168.

95. See Frontaura, *supra* note 75, at 21.

96. Acuerdo de Complementación Económica N° 36 Celebrado entre los Gobiernos de los Estados Partes del MERCOSUR y el Gobierno de la República de Bolivia, available at http://www.sice.oas.org/trade/mrcsbo/MERBO1_S.asp (last visited Sept. 7, 2004).

97. Acuerdo de Alcance Parcial de Complementación Económica entre los Gobiernos de las Repúblicas de Colombia, Ecuador, Perú y Venezuela, Países Miembros de la Comunidad Andina, y el Gobierno de la República Federativa del Brasil, available at <http://www.sice.oas.org/Trade/acecabrs/indice.asp> (last visited Sept. 7, 2004).

bers of the Andean Community) signed a PSECA No 48 with Argentina under LAIA's framework on June 29, 2000, that was similar to PSECA No. 39.

AC- MERCOSUR signed once more an ECA No. 56 on December 6, 2002, whereby they agreed to implement an FTA by 2003. However, it is important to note that a PSECA between MERCOSUR and Peru was signed on August 25, 2003 under LAIA's framework.⁹⁸ Its main purpose is to establish the foundations for the formation of an FTA among the contracting parties.

The remaining Andean countries, Colombia, Ecuador, and Venezuela, finally reached an agreement with MERCOSUR by signing the ECA No. 59 on December 16, 2003. It takes into consideration the treaties already signed with Bolivia and Peru for the constitution of an FTA between the two blocks. It will enter into force by mid 2004.⁹⁹ Like the previous agreement, this agreement continues to promote a program based on a progressive and automatic liberalization of tariffs and non-tariff barriers.

This process shows the difficulties the AC faces when negotiating with strong counter-parties in the region. The strong cohesion required to act with a single voice was diminished by the early agreements signed by Bolivia and Peru. Although the final result achieved in 2003 is an important sign of political cohesion among South American nations, it also imposes tremendous challenges to the Andean economic sectors, as Brazilian and Argentinean products will start circulating in markets which used to be highly protected from their competition. However, the road for increasing cooperation, coordination, articulation and convergence between the two blocks is already open. This scenario requires vigorous leadership from the bodies and institutions of the AIS, close monitoring by private interests and detailed converging supranational and domestic regulation.

D. THE ROLE OF THE AC IN THE NEGOTIATIONS TOWARDS THE ESTABLISHMENT OF THE FTAA AND ITS IMPLICATIONS: ACTING WITH A SINGLE VOICE

As for the FTAA process itself, there is a great deal of literature available on the subject.¹⁰⁰ This sub-section only refers to the meaning and

98. Acuerdo de Complementación Económica No 58 Mercosur – Perú, *available at* <http://www.sice.oas.org/Trade/MRCSRPER/ACE.asp> (last visited Sept. 7, 2004).

99. Reunión MERCOSUR – CAN: Acta del Acuerdo de Complementación Económica No. 59, Dec. 14-15, 2003, *available at* http://www.sice.oas.org/Trade/mrcsrac/acta_s.asp.

100. See José Antonio Rivas-Campo & Rafael Tiago Jug Benke, *FTA Negotiations: Short Overview*, 6(3) JIEL 661-694 (2003), *available at* <http://www.netamericas.net/Researchpapers/Documents/Benke/Benke2.pdf> (last visited Sept. 7, 2004); Sherry M. Stephenson, *The State of the FTAA Negotiations at the Turn of the Millennium*, 6 LAW & BUS. REV. OF THE AM. 317 (2000); HERMINIO M. BLANCO, ET AL, A KEY TO HEMISPHERIC INTEGRATION (INTAL-ITD, Occasional Paper No. SITI-03, 2004), *available at* http://www.iadb.org/intal/Ingles/Publicaciones/Blanco-Zabludovsky-GLora_OP-SITI-03.pdf (last visited Sept. 7, 2004); Jagdish Bhagwati, *The FTAA is Not Free Trade*, in TRADE: TOWARDS OPEN REGIONALISM – PROCEEDINGS OF AN ANNUAL WORLD BANK CONFERENCE 13-19 (Shahid Javed

results of acting with a single voice in the negotiations.

The APC received with interest the original proposal made by the American Government in the Summit of the Americas in 1994,¹⁰¹ and has consistently imparted instructions to the AIS in order to act jointly within the negotiations. The Presidential guidelines have stressed the importance of ensuring an agreement that will offer the necessary conditions for the equitable participation of the Andean countries, considering their varying levels of development and the different sizes of their economies. In the XIII Summit, Act of Carabobo 2001, APC entrusted ACFM and CAC, with the assistance of AGS, with working on preparing, executing, and following up a Community strategy within the context of the negotiations towards the FTAA.

It is clear from the member countries' point of view that acting as a bloc increases their bargaining power and also assists them with strategically protecting the sub-regional market already gained from sudden or less progressive opening to non-members as a consequence of a badly negotiated FTAA.¹⁰² The AC already has in place an FTA that allows member countries to have a single market for Andean products. As a result, it has been easier for Andean countries to agree on certain matters relating to trade in goods, bringing a joint position to the FTAA's negotiation table.¹⁰³

However, depending on the scope of application of the MFN clause within the final FTAA agreement, the AFTA may not survive because it risks being absorbed by the enhanced Hemispheric FTA.¹⁰⁴ In addition, the flexibility gained by the postponement of the Andean CET to 2005 may give a false sense of internal lack of consensus affecting their single proposals and cohesion within the final part of the negotiations when the most problematic issues are addressed.

Burki et al. eds., 1998); Joaquín Roy, *El ALCA: Origen, Evolución, Consecuencias*, 1-2 *POLITICA INTERNAZIONALE* 157-168 (2003); Joaquín Roy, *Origen y Consecuencias de la Cumbre de Miami*, in *INTEGRACION EUROLATINOAMERICANA* 559-575 (1996). On the possible effects of FTAA on AC in the area of investments, see Comunidad Andina, *Evaluación de las Negociaciones del ALCA en Materia de Inversiones: Posibles Resultados y Implicancias en la Conformación del Mercado Común Andino* [Report on the implications of FTAA in the field of investment and its possible effects and implications on the ACM], available at <http://www.comunidadandina.org/documentos/docSG/SGdi543.pdf> (last visited Sept. 7, 2004).

101. For information on the FTAA, see Free Trade Area of the Americas – FTAA website, at http://www.ftaa-alca.org/alca_e.asp (last visited Sept. 7, 2004).

102. See Frontaura, *supra* note 75, at 21.

103. According to a press release by the AGS on Feb. 15, 2003, as consensus has been reached on 86% of intra-Community trade, the Andean countries have proposed to the FTAA negotiations tariff reduction periods of up to ten or more years. See Press Release, High Level of Agreement Strengthens Andean Position in FTAA (Feb. 15, 2003), available at <http://www.comunidadandina.org/ingles/press/np15-2-03.htm>.

104. See Fernando Gonzalez Vigil, *La Comunidad Andina de Naciones (CAN) ante el ALCA*, IADB, at 5, available at http://www.iadb.org/intal/foros/gonzalez_vigil-f101.pdf (last visited Sept. 7, 2004).

Following the NAFTA model, FTAA includes, among others, novel issues such as trade in services, investment, copyright and government procurement, making it more difficult for the Andean countries to reach a concerted position. However, an important factor resultant from the movement towards the establishment of the ACM and the convergence G-3 may create is precisely this slow process towards the harmonization of regulation related to these subjects. Although there is Andean regulation in place related to intellectual property and also a framework for trade in services, (see Table II), this Andean harmonization may collide with the FTAA if the single voice gained by the Andean countries is not enough to defend its vision on these subjects.¹⁰⁵

On March 19, 1998 the Andean countries started participating for the first time as a bloc in the FTAA negotiations. Their joint participation in the FTAA's groups, committees, and ministerial and vice-ministerial meetings has resulted in the Andean Countries chairing three of the nine negotiating groups. It has also permitted the AC member countries to assume the chairmanships and vice-chairmanships of several of the FTAA bodies.¹⁰⁶ This result is seen as a sign of success ensuring that the region's interests are taken into account.

In the end,, whatever the results of the negotiations, the AC must continue speaking with a single voice internally, as the implementation of the FTAA could change the economic¹⁰⁷ and legal structure of the Andean countries. First, this scenario will pressure the AC to design adequate policies to bring economic and financial stability to the region. Secondly, it should result in the issuance of the regulations needed to properly implement and enforce the commitments reached and to lead their domestic implementation.

E. THE NEGOTIATION OF PREFERENTIAL TRADE AGREEMENTS
BETWEEN SOME ANDEAN COUNTRIES AND THE UNITED
STATES: THE ROLE OF AND THE CONSEQUENCES
WITHIN THE AC

On Tuesday May 18, 2004, in Cartagena, Colombia, three members of the AC started negotiations with the United States for the establishment of a Free Trade Agreement. These negotiations resulted from at least two circumstances. From the Andean countries point of view, negotiating a PTA with the United States is core as the unilateral tariff preferences granted to certain products by the U.S. Government, firstly through the

105. Julio Cesar Gil, *The FTAA, a Step Further in the Consolidation of the Andean Community*, 62 CAPITULOS DEL SELA 17, 20-21 (2001), available at <http://lanic.utexas.edu/~sela/AA2K1/ENG/cap/N62/rcap62-4.htm> (last visited Sept. 7, 2004).

106. For instance, Ecuador presided over the FTAA until November 1, 2002. See Andean Community, *Free Trade Area of the Americas*, available at <http://www.comunidadeandina.org/ingles/common/ftaa.htm> (last visited Sept. 7, 2004).

107. See Miles K. Light, *Free Trade of the Americas Agreement Economic Impacts for the Andean Community*, Andean Community, available at <http://www.comunidadeandina.org/ingles/document/Alca.htm> (Aug. 2003).

Andean Trade Preference Act (ATPA) and later on by the Andean Trade Promotion and Drug Eradication Act (ATPDEA) will expire in 2006. There is an obvious need to preserve the advantages obtained and the positions already gained by some Andean products within U.S. markets. From the U.S. perspective, due to the difficulties present in the negotiations towards the establishment of the FTAA and within the WTO Doha Round,¹⁰⁸ the U.S. Trade Representative, Robert Zoellick, adopted a policy of one-by-one negotiation. This policy has already delivered within the region the US-Central America and the US-Chile PTAs.

1. From ATPA to ATPDEA

Due to difficulties generated by drug production in some Andean countries, drug smuggling to and drug consumption in the United States, a program was adopted in 1991 for the promotion of economic alternatives to drug-crop production in the Andean region.¹⁰⁹ The ATPA¹¹⁰ authorized the U.S. government to proclaim duty-free treatment for all eligible articles from any beneficiary country, to designate beneficiary countries, and to proclaim duty reductions for certain goods not eligible for duty-free treatment. Consequently, Bolivia, Colombia, Ecuador and Peru were granted duty-free access to the U.S. market for a wide range of approximately 5,600 products.¹¹¹

From the beginning of the program, Colombia was the largest ATPA trading partner of the United States, with flowers being its leading export under the ATPA. Bolivia was the main supplier of jewelry and precious metals, followed by Peru. The overall effect of ATPA imports on the U.S. economy and consumers was considered small, whereas U.S. imports of ATPA-exclusive products had a potentially significant effect on domestic

108. This was mainly as a consequence of the strong opposition from developing countries, such as Brazil and India, to accept certain conditions related to agricultural subsidies. This issue is also sinking FTAA negotiations.

109. ATPA was also aimed at helping build the economies of the countries within the sub-region and at strengthening democracy and sub-regional stability by providing the Andean Governments with effective means to fight narco-terrorism. See Press Release U.S. Department of State, Andean Trade Preference Act (Mar. 23, 2002), available at <http://www.state.gov/p/wha/rls/fs/8979pf.htm>. ATPA considered benefits similar to those granted under the Caribbean Basin Economic Recovery Act, known as the Caribbean Basin Initiative (CBI) (1983, amended 1990). The United States-Caribbean Basin Trade Partnership Act (CBTPA), (2000) amended CBI, providing additional trade benefits. See H.R. 434, 106th Cong., 2d Sess. (2000), available at <http://www.sice.oas.org/Trade/usdevact/act.asp#Title%20II%20-%20CBI> [hereinafter ATPA]. See also U.S. Department of Commerce, *Andean Trade Preference Act*, available at <http://www.mac.doc.gov/atpa/webmain/intro-revise.htm> (last visited Sept. 7, 2004); International Trade Data System, *Andean Trade Preference Act (ATPA)*, available at <http://www.itds.treas.gov/atpa.html> (last visited Sept. 7, 2004).

110. See ATPA, available at <http://www.sice.oas.org/Trade/tradeact/ATPA.asp>.

111. The list of ATPDA products is available at <http://www.mincomercio.gov.co/VBeContent/NewsDetail.asp?ID=716&IDCompany=16> (last visited May 24, 2004). See also U.S. Int'l Trade Commission, *Andean Trade Preference Act (2nd Report): Executive Summary*, available at <http://www.usitc.gov/332s/ES2926.htm> (last visited Sept. 7, 2004).

industries.¹¹²

ATPA expired ten years later on December 4, 2001. The duties for the products included in the ATPA were reinstated at the time, and the program was renewed and expanded in 2002 by the Trade and Development Act of 2002.¹¹³ Division C, Title XXXI of the Act entitled the ATPDEA rules the renewal and expansion of ATPA. Section 3102 amended section 208 of ATPA, establishing the termination of the preferential agreement on December 31, 2006.

2. *From ATPDEA to PTAs*

Before extending the benefits granted under ATPDEA, the U.S. President estimates whether the eligible countries meet the suitability criteria established in the law. Among others, and for the purposes of this article, the following should be highlighted: (1) whether the beneficiary country has demonstrated a commitment to participate in negotiations toward the completion of the FTAA or another free trade agreement; and (2) the extent to which the country provides protection of intellectual property rights consistent with or greater than the protection afforded under the WTO.

Certainly, the ATPA/ATPDEA process has influenced the Andean countries during the last decade. When assessing the work towards the establishment of the ACM, Table II indicates that one of the areas in which Andean regulation has developed the most is precisely the protection of intellectual property rights. This effort made the countries not only ready for ATPA/ATPDEA eligibility, at least in one of the long list of criteria, but also promoted the harmonization of standards among the sub-region. This is indeed an example of the consequences of developing countries entering into agreements with developed nations. The expected benefits of a North-South relation pressure the harmonization and convergence of regulations which is very difficult to attain within South-South integration schemes.

The unilateral tariff reduction granted under the previous compliance of determined requirements has paved the way for a certain degree of legal convergence among the ATPA/ATPDEA beneficiaries. This in turn will make negotiations towards the PTAs less complicated and may ex-

112. "[T]he probable future effect of ATPA on the United States, as estimated by an examination of export-oriented investment in the beneficiary countries, also is expected to be minimal in most sectors." ATPA also had a small, indirect, but positive effect on drug-crop eradication and crop substitution efforts in Bolivia and Peru in 2001. It had limited effects in Colombia. See ANDEAN TRADE PREFERENCE ACT: IMPACT ON U.S. INDUSTRIES AND CONSUMERS AND ON DRUG CROP ERADICATION AND CROP SUBSTITUTION (U.S. International Trade Commission, Investigation No. 332-352, 2002), available at <http://www.usitc.gov/wais/reports/arc/w3538.htm> (last visited Sept 7, 2004). Full report available at <ftp://ftp.usitc.gov/pub/reports/studies/PUB3538.PDF> (last visited Sept. 7, 2004).

113. Trade Act of 2002, available at http://otexa.ita.doc.gov/AGOA-CBTPA/H3009_CR.pdf (last visited Sept. 7, 2004).

plain the U.S. decision to conduct them simultaneously with individual Andean members.

It is also important to consider that the FTAA, if agreed, will dilute the ATPDEA benefits because it allows all Latin countries equal access to U.S. markets. This may generate trade-diversion and AC exports to the United States may fall.¹¹⁴ In this sense, the hurry evidenced in some of the Andean countries to negotiate a PFT with the United States, perhaps under better conditions and before other countries get preferential access to the U.S. markets, makes sense for their individual interests. Perhaps less when considering the bargaining powers the region could gain if negotiating as a bloc with the United States and Canada.

On the other hand, the ATPA/ATPDEA processes have been originated by political, social, health and other national security related issues which necessarily link the United States with the Andean countries. Colombia for instance, may try to play the political cards of being both a reliable partner in the fight against terrorism as well as the victim of the dangerously extended vermin of drug dealing and drug consumption. However, it is clear that a PTA is a different proposition that goes further than the unilateral granting of certain tariffs within the context of a core program for the eradication of cocaine crops. Hence, the conditions in these negotiations once again tend to accommodate the interest of the parties, i.e., the best interests of the strongest party and the less detrimental consequences for the rest.

No Andean government is going to take on the political hazard of failing to reach any agreements with the United States despite the trading conditions offered by the American administration. The fear of losing the positions already gained by some Andean products within the U.S. markets and, therefore, the extreme pressure from the Andean local interest groups will give little room for the Andean negotiators to maneuver. In this sense, the Andean position is rather weak, as the counter party is not under such stress and has enough experience in dealing with countries facing similar conditions. Chile¹¹⁵ and Central American¹¹⁶ countries, for example, ended up with similar NAFTA-styled agreements.

The defensive nature of these negotiations will find the Andean parties looking for sensible frameworks for liberalization. Therefore, the role of the Andean governments and of the interest groups should be that of establishing and putting in place at the Andean and domestic levels, the adequate policies which enable the maximum amount of Andean eco-

114. See Light, *supra* note 107.

115. For an analysis by AGS of the Agreement US-Chile, see ANALISIS DEL TRATADO DE LIBRE CHILE – ESTADOS UNIDOS (AGS, Working Doc. No. SG/dt 221, 2003), available at <http://www.comunidadandina.org/documentos/docSG/SGdt221.pdf>.

116. For an analysis by AGS of the Agreement US-Central America, see ANALISIS DEL TRATADO DE LIBRE COMERCIO CENTROAMERICA – ESTADOS UNIDOS (AGS, Working Doc. No. SG/di 620/Rev. 1, 2004), available at <http://www.micip.gov.ec/TLC/documentos/An%C3%A1lisis%20del%20TLC%20CHILE-%20EEUU.pdf>.

conomic sectors to get ready for and to bare the consequences of competition, when tariffs finally reach zero.

In this sense, the AC has an important leading role to play. First of all, it is core that the Andean Secretariat efficiently supports and follows up the negotiations. Secondly, within an effort of articulation, coordination, cooperation and convergence, the respective Andean bodies and institutions of the AIS should discuss, establish and enact adequate policies and related regulations to better prepare the sub-region for the positive and negative consequences of the competition about to come. Having appropriate policies and regulations at the supranational level will shield any attempt by local governments to delay or redirect whatever was gained on the negotiation tables in detriment of the Andean citizens or any other member country.

At the same time, strong leadership and understanding is required within the Andean Secretariat, as Venezuela is not negotiating a PTA with the United States, and Bolivia has not yet been invited to participate in the negotiations. This article argues that the AC strongly relies on the political will of its Presidents. There is momentum within three out of five member governments to engage in a PTA with the United States. As these agreements will certainly have direct and indirect consequences in the AC, this political will should be channelled to attain adequate decision making within the AIS. Therefore, it is essential to direct this collective work in benefit of the sub-regional scheme and to have the stamina required in order to propose and to support decisions that could change temporarily or on a regular basis the nature or even the actual composition of the AC.

IV. CONCLUDING REMARKS

This article has been a journey through the Andean Integration since its creation. It has defined it as a "top down process" which heavily relies on the Presidential leadership of their members whose guidelines are being implemented by means of an elaborate system of bodies and institutions. In this sense, the AC still substantially depends on the political limitations of its leaders rather than the rule of law. It has been one of its historical features and legacies. However, it is indeed a millstone able to sink the pace of integration when the sub-region enters into politically turbulent phases. This weakness in the AC structural design threatens both the internal and external undertakings currently going on and discussed in this paper.

Even though these complex processes have already started and actions are being taken, it is too early to draw a conclusion regarding the future of the AC. However, the establishment of the ACM is such a crucial task that indeed affects the welfare of the Andean citizens. Making ACM functional on a scheme that scores extremely high when assessing political risk might jeopardize its successful achievement. The simultaneous negotiations of important mechanisms geared towards opening sub-re-

gional boundaries to free trade is another element actually affecting the efficiency of the AIS in order to comply with the timeframe given by the APC to set it up.

In this sense, the answer lays in convergence. Almost all agreements in place and the ones under negotiation, namely G-3, FTAA, and PTAs between some Andean countries and the United States already include or might incorporate chapters related to subjects which are directly related to sectors that should be liberated to establish a Common Market (capital, labour and services). Before issuing any Andean supranational rules, the AIS should sensibly consider the adoption of a pragmatic approach delaying the establishment of the ACM as it has already done with the ACET, until the horizon is clearer.

At the same time, when issuing decisions concerning the movement of capital, services and labor, they should incorporate at least minimum standards that allow convergence with actual and future commitments with non-members, bearing in mind the direct application of the Andean supranational law into the domestic legal frameworks. By doing so, the sub-region gains a great deal of supranational and domestic convergence through the rule of law, ring-fencing with it what has already been achieved against political risk.

This important work in the field of the rule of law will be meaningless without the proactive participation of the private sector. Its influence will shape the answer to the question about whether member countries are ready to sacrifice their legitimate interests of securing and deepening their relations with non-members in order to advance to greater Andean consolidation. The internal cohesion required and the extraordinary efforts of articulation, cooperation, co-ordination and convergence it takes to implement the ACM and to carry on the demanding negotiation processes, claim from the AIS prioritization of duties and finding the precise balances in order to overcome its historic sluggishness.

Offering a legal framework that allows the convergence of the ACM with the external commitments of the member countries will be conducive to reconcile the divided loyalties this complex environment is promoting. Notwithstanding their differences and contrasting positions, these demanding times require from all those involved not only a great deal of loyalty and protection of their own countries' interests but also a strong consciousness of the Andean related issues. Furthermore, those involved must remain aware that they are all also citizens of an increasingly globalized world.